ADMINISTRATIVE APPEAL OF

THE HOPI INDIAN TRIBE

v.

COMMISSIONER, BUREAU OF INDIAN AFFAIRS

IBIA 75-60-A Decided September 26, 1975

Appeal from an administrative decision of the Commissioner of Indian Affairs issued October 10, 1974, disapproving Ordinance Nos. 23 and 24, passed by the Hopi Indian Tribal Council.

Docketed and Reversed.

1. Indian Tribes: Constitution, Bylaws and Ordinances--Indian Tribes: Tribal Authority

The organic law of the Hopi Tribe found in a constitution authorized by statute formulated and adopted by the tribal members and approved by the Secretary of the

> Interior, should be construed for its ultimate meaning under the same rules as are applied in the construction of state and federal constitutions and statutes.

APPEARANCES: Boyden and Kennedy, Salt Lake City, Utah, for appellant, and the Hopi Tribe; David E. Jones, Office of the Solicitor, Department of the Interior, for the Commissioner, Bureau of Indian Affairs; Brown, Vlassis and Bain, Phoenix, Arizona, for the Navajo Tribe.

OPINION BY ADMINISTRATIVE JUDGE WILSON

This is an appeal from the Memorandum Decision of the Commissioner of the Bureau of Indian Affairs, issued October 10, 1974, allegedly not delivered to the appellant until January 10, 1975, whereby Hopi Ordinance Nos. 23 and 24 were disapproved. The appeal filed with the Commissioner was transmitted with the record on February 21, 1975, to the Board of Indian Appeals where it was received February 26, 1975. Although the Commissioner in his transmittal contends that the appeal was not timely filed, he suggests that the Board should waive the time requirements of 25 CFR Part 2 and consider the appeal on its merits since he had disapproved the two ordinances on the merits of the case.

Without addressing the issue of timeliness of filing of a notice of appeal, the time requirements of 25 CFR Part 2 in effect prior to June 11, 1975, are hereby waived under authority of 25 CFR 1.2 and the Board hereby dockets this case for decision on the merits as a timely filed appeal.

It is only necessary to consider the applicability of the February 26, 1975, decision of the Commissioner as it applies to Ordinance Nos. 23 and 24 since the approval of the other ordinances remain unaffected by this decision.

Legal briefs or statements were filed by all parties in the matter. Moreover, oral arguments were held in the matter on July 28, 1975, at Salt Lake City, Utah. Accordingly, all parties have thus been heard.

The issue presented in this appeal as pointed out in the Hopi's brief and oral argument is whether Sections 1 and 2 of Article VI of the Hopi Indian Tribal Constitution can be so construed so as to be compatible as they are applied to determine the validity and effectiveness of Ordinance Nos. 23 and 24. The word "approved" appears in Section 1 and the word "review" appears in Section 2. The Hopi Constitution was approved by the Secretary of the Interior on December 19, 1936, pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended, section 16, 25 U.S.C. § 476 (1970).

Article VI of the Constitution on which the dispute focuses contains the following language:

ARTICLE VI - POWERS OF THE TRIBAL COUNCIL

Section 1. The Hopi Tribal Council shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934. The Tribal Council shall exercise these powers subject to the terms of this Constitution and to the Constitution and Statutes of the United States.

(a) To represent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, and to negotiate with the Federal, State, and local governments, and with the councils or governments of other tribes.

* * * * * *

(g) To make ordinances, subject to the approval of the Secretary of the Interior, to protect the peace and welfare of the Tribe, and to set up courts * * * for the trial and punishment of Indians within the jurisdiction charged with offenses against such ordinances.

* * * * * *

Section 2. Any resolution or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior, shall be given to the Superintendent of the jurisdiction, who shall, within ten days thereafter, approve or disapprove the same.

If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall send a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety days from the date of enactment, veto said ordinance or resolution for any reason by notifying the Tribal Council of his decision.

> If the Superintendent shall refuse to approve any ordinance or resolution submitted to him, within ten days after enactment, he shall report his reasons to the Tribal Council. If the Tribal Council thinks these reasons are not sufficient, it may, by majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective. (Emphasis supplied.)

The record is not clear, but no one has attempted to contend that the two ordinances in question were not signed by the Superintendent within the time allowed in Section 2. Nor is there any contention that the Secretary or anyone disapproved the ordinances in question within the 90 days allowed for his review and possible veto. Disapproval of the ordinances was announced for the first time by the Commissioner more than 90 days following enactment.

In the order or ruling issued by the Commissioner on October 10, 1974, the following statement was made:

> * * * The manner of review provisions is a non-functional section of that Constitution until Section 1 of Article VI is amended to provide that certain tribal council powers are, in fact, subject to Secretarial review. * * * (Emphasis supplied.)

This review will be confined to consideration of Article VI which was the subject of the Commissioner's decision.

It is the Commissioner's untenable conclusion that one portion of the Constitution, i.e., Section 2 of Article VI is "nonfunctional" for the reason that it has no other portion of the Constitution upon which to operate. This construction disregards the rule which requires that no part of a constitution or statute is to be disregarded if an application of a stated provision can be found.

The appellant presents a strong argument in regard to the Commissioner's foregoing conclusion in its brief as follows:

> If, as the Commissioner contends, the procedures and time limitations contained in Section 2 of Article VI apply only to ordinances or resolutions requiring Secretarial "review," as that distinction is made by the Commissioner, then in that case the review procedures and time limitations become a nullity, since there is no authority in the Constitution for the Tribal Council to pass an ordinance or anything else subject merely to "review." It need scarcely be documented that such interpretation is disfavored and is to be avoided in all possible cases. See e.g., Ex parte Public National Bank of New York, 278 U.S. 101, 73 L.Ed. 202, 49 S. Ct. 43 (1928).
>
> It is entirely logical and reasonable, indeed, upon reading Article VI as a whole, it is obvious that the "approval by the Secretary" referred to in Section 1 of Article VI is precisely the process of obtaining review referred to in Section 2, which process is explicitly subject to the stated time limitations. Here again, well-established principles of construction require that a document be construed as a whole to give effect to all its parts. See, e.g., Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633, 37 L.Ed.2d 207, 93 S. Ct. 2469 (1973).

In Ex Parte Public National Bank, supra, cited by appellant, the Supreme Court said:

> But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" Market Company v. Hoffman, 101 U.S. 112, 115. (Emphasis supplied.)

In Weinberger, supra, cited above in the Hopi brief, the Supreme Court was required to interpret the provisions of the 1962 amendments to the Federal Food, Drug and Cosmetic Act. The Court said:

> Moreover, Hynson's argument * * * would render clause (C) superfluous. Under Hynson's reasoning, any drug that could satisfy clause (B) - i.e., any drug that had become generally recognized as safe--automatically would satisfy clause (C). This construction, therefore, offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect. See, e.g., Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307; Ginsberg & Sons v. Popkin, 285 U.S. 204, 208. * * * (Emphasis supplied.)

[1] In line with the cases cited above the organic law of the Hopi Tribe found in the Constitution authorized by statute, formulated and adopted by the tribal members and approved by the Secretary of the Interior should be construed for its ultimate meaning

under the same rules as are applied in the construction of state and federal constitutions and statutes. Accordingly, we find no reason why the ordinances in question should not be construed in that manner.

In the oral arguments held in the matter the Commissioner in furtherance of his position contended that:

(1) The ordinances in question were subject to approval by the Secretary to become effective.

(2) The Board lacked jurisdiction to review the action of the Commissioner.

We are not in agreement with either contention. The argument that the review provisions of Section 2 of Article VI are nonfunctional is wholly untenable. To uphold such construction would totally disregard the cardinal rule hereinabove discussed which requires that no part of a constitution or statute is to be disregarded if a logical application thereof can be found. Well established principles of statutory construction require that a document be construed as a whole to give effect to all its parts. Weinberger v. Hynson, Westcott and Dunning, Inc., supra.

We are not persuaded by the Commissioner's argument that the Board lacked jurisdiction to review his decision.

The Commissioner in his decision of February 6, 1975, officially disapproving the ordinances in question, did not treat the matter as discretionary and final for the Department. On the contrary, the Commissioner on the same date in transmitting the Hopi appeal of January 20, 1975, requested that the Board review the appeal on its merits. The Commissioner's transmittal of February 21, 1975, in relevant part, stated:

> It is clear to us that the appeal period expired long before the filing of the enclosed complaint. However, we suggest you consider waiving the time limits and rule on the merits of the case. (Emphasis supplied.)

The Navajo Tribe, allowed to participate in the oral arguments due to its interest in the matter, contends:

> (1) That the ordinances in question required approval by the Secretary rather than the Superintendent because of the far-reaching effects of the ordinances.
>
> (2) That the law and order and grazing regulations regarding the disputed area, effective as of August 1, 1975, will render the Hopi ordinances moot.

The Navajo's first argument has been discussed elsewhere in connection with the Commissioner's contention to the same effect and needs no repeating or further elaboration at this point.

The Board finds merit in the Navajo contention No. 2. In connection therewith, the Board takes note of the Act of December 22, 1974, 88 Stat. 1712; the Law and Order and Grazing regulations appearing in the Federal Register, Vol. 40, No. 128, dated July 2, 1975; and the case of Healing v. Jones, 210 F. Supp. 125 (D. Ariz., 1962), aff'd 363 U.S. 758 (1963). It would appear to this Board that the Federal District Court for the District of Arizona continues to retain jurisdiction over the disputed area and the parties involved therein by virtue of Healing v. Jones, supra, and the Act of December 22, 1974, supra. Moreover, any local interference thereto by either Tribe would be dealt with as the court might deem appropriate. It further appears that the grazing and protective regulations promulgated pursuant to Healing v. Jones, supra, and the Act of December 22, 1974, supra, would stay the efficacy of Hopi Ordinance Nos. 23 and 24.

For the reasons hereinabove set forth, the Board finds:

(1) That the time limitations set forth in Section 2, Article VI, of the Hopi Constitution is binding upon the

Commissioner and that both ordinances became effective upon approval by the Superintendent. 1/

(2) That the Board has jurisdiction over the subject matter.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), as amended June 12, 1975, the decision of the Commissioner of Indian Affairs, dated October 10, 1974, disapproving Hopi Ordinance Nos. 23 and 24, be, and the same is hereby REVERSED.

This decision is final for the Department.

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Alexander H. Wilson
Administrative Judge

We concur:

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Mitchell J. Sabagh
Administrative Judge

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James R. Richards
Director, Office of Hearings and Appeals

1/ Memoranda of April 18, 1941, and April 26, 1941, of W. H. Flanery, Chief of Division, Office of the Solicitor, Department of the Interior, further substantiate the position of this Board. However, the memoranda were made known to the Board too late for its consideration in arriving at its decision.